In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1744

WILLIE R. BARNES, as Commissioner of Corporations of the State of California,
Petitioner,

vs.

HEWLETT-PACKARD COMPANY, a California corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner has not set forth a single ground for the granting of certiorari which merits serious consideration by the Court. The decision of the United States Court of Appeals for the Ninth Circuit in the case at bar is clearly correct and there is no need for this Court to review that decision.

I. THE DECISION OF THE COURT OF APPEALS IS CORRECT. THE LANGUAGE OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 AND ITS LEGISLATIVE HISTORY REQUIRED THE DETERMINATION THAT ERISA PREEMPTS THE CALIFORNIA KNOX-KEENE HEALTH CARE SERVICE PLAN ACT OF 1975 INSOFAR AS THAT ACT APPLIES TO RESPONDENTS' ERISA-REGULATED EMPLOYEE BENEFIT PLANS.

Congress, in enacting the Employee Retirement Income Security Act of 1974 (88 Stat. 829, 29 U.S.C. § 1001, et seq.), specifically provided that:

> "• • • the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)" (§ 514(a) of ERISA (88 Stat. 897, 29 U.S.C. § 1144(a))).

The scope and purpose of the preemption are made clear by the legislative history:

> "• • • I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. • • •

> "The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof • • • which would affect any employee benefit plan • • • " (120 Cong.Rec. (Aug. 20, 1974) H 8701).

One of the narrow exceptions to preemption is set forth in § 514(b)(2) (88 Stat. 897, 29 U.S.C. § 1144(b)(2)) of ERISA:

> "(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance • • • .
>
> "(B) Neither an employee benefit plan described in section 4(a)[1] • • • nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer • • • or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts • • •."

Respondents' employee health benefit plans are admittedly subject to regulation by ERISA (Pet., p. 5). The Court of Appeals decided that, insofar as the California Knox-Keene Health Care Service Plan Act of 1975 (Cal.Health & Saf.Code, § 1340, et seq.) applies to those plans, Knox-Keene is not exempt under the insurance exemption from

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[1]Section 4(a) (88 Stat. 839, 29 U.S.C. § 1003(a)) defines which plans are regulated by ERISA. Petitioner admits that the plans here involved are subject to regulation by ERISA (Pet., p. 5).

ERISA preemption. Any other decision would have flown in the face of the clear language of ERISA and the congressional goal of national uniformity. As shown above, the basic purpose of preemption was to eliminate "the threat of conflicting and inconsistent State and local regulation" of employee benefit plans (120 Cong.Rec. (Aug. 20, 1974) H 8701).

Contrary to petitioner's contention (Pet., p. 10), insofar as Knox-Keene regulates respondents' employee benefit plans, it is not a state law regulating insurance—self-funded employee benefit plans are not insurance.[2] But even if it be assumed that Knox-Keene were a state law regulating insurance, it is not exempt from preemption. Section 514(b)(2)(B) mandates that an employee benefit plan covered by ERISA shall not "be deemed to be an insurance company or other insurer" or "to be engaged in the business of insurance • • • for the purposes of any law of any State purporting to regulate insurance companies, insurance contracts."

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[2]As the Department of Labor, which is empowered to administer ERISA, has determined, ERISA

> " • • • adopts a distinction between insurance and employee benefit plans similar to a line of state cases typified by *State ex rel. Farmer v. Monsanto Company,* 517 S. W. 2d 129 (Mo. 1974). That case held that a company which provides benefits directly to its own employees and their dependents is not in the insurance business. In order to be covered by the Missouri law, the company must be in the business of selling insurance to persons other than its own employees" (CCH Pension Plan Guide, Vol. 4, ¶ 25,136 (11-4-76), pp. 27,206-27,207).

And the district court opinion in *Manasen* v. *California Dental Services* (N.D.Cal. 1976) 424 F.Supp. 657 (Pet., p. 10) is of no aid to petitioner. *Manasen* did not involve ERISA and did not involve self-funded employee benefit plans.

Petitioner's arguments would emasculate the congressional goal of national uniformity of regulation of employee benefit plans and avoidance of conflicting and inconsistent state regulation. States, by simply enacting legislation regulating employee benefit plans and denominating them as insurance laws, would be able to avoid ERISA preemption.

There is no basis for petitioner's contention that the Court of Appeals' construction of § 514(b)(2)(B) renders § 514(b)(2)(A) meaningless (Pet., pp. 11-12). To the contrary, the fact that the construction of § 514(b)(2)(B) by the court below leaves § 514(b)(2)(A) as a vital part of ERISA is demonstrated by the Court of Appeals' decision in *Wadsworth* v. *Whaland* (1 Cir. 1977) 562 F.2d 70, the very case which petitioner erroneously contends conflicts with the decision in the case at bar (Pet., pp. 11-12).

In this connection, there is no basis for the petitioner's reliance on the district court's decision in *Wadsworth* to create a conflict with the case at bar. In *Wadsworth,* the issue was whether a state insurance law, which did not regulate employee benefit plans directly but which affected plans indirectly by regulating the contents of group insurance policies purchased by employee benefit plans, was preempted by ERISA. In *Wadsworth,* the Court of Appeals, in holding there was no preemption where there was no direct regulation of employee benefit plans, construed § 514(b)(2)(A) and § 514(b)(2)(B) consistently with the interpretation given by the court in the case at bar. Moreover, it cited with approval the decision of the district court in the instant case (Appx. B to Pet., p. 7),

which was adopted by the court below (Appx. A to Pet., p. 1).[3] Thus, there is no conflict among the courts.[4]

II. PREEMPTION OF THE KNOX-KEENE ACT DOES NOT LIMIT THE STATE'S POWER TO REGULATE THE BUSINESS OF INSURANCE WITHIN THE MEANING OF McCARRAN-FERGUSON.

The above is also a complete response to petitioner's assertion that the decision of the Court of Appeals impairs the McCarran-Ferguson Act (Pet., pp. 13-15). Insofar as Knox-Keene regulates employee benefits, it is not a state law regulating insurance because employee

[3]In *Wadsworth*, the court pointed out:

"Thus, the deemer provision prevents a state from subjecting a plan, as a business of insurance, to the state's general insurance laws or enacting special legislation regulating plans as a 'unique variety of insurance.' *Hewlett-Packard Co. v. Barnes*, 425 F.Supp. 1294, 1300 (N.D.Cal.1977). However, on its face the deemer provision does not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans.

"We are unable to accept plaintiffs' contention that the deemer provision forbids the states from indirectly affecting employee benefit plans by regulating group insurance. In order to accept plaintiffs' construction, we would have to construe § 514 without its saving clause pertaining to state regulation of insurance" (562 F.2d 77-78).

The Court of Appeals' decision in the instant case leaves § 514(b)(2)(A) to carry out the function it was intended to achieve. In not exempting a person from complying with state laws regulating insurance, banking and securities, § 514(b)(2)(A) was intended to prevent a spillover effect of the ERISA preemption. In other words, it was intended to prevent those who deal with employee benefit plans from claiming exemption from state regulation because of their relationship to the benefit plans.

[4]Petitioners also contend that the Court of Appeals' decision in the instant case is in conflict with *Insurers' Action Council, Inc.* v. *Heaton* (D.Minn. 1976) 423 F.Supp. 921 (Pet., p. 12). Certainly, dicta in a district court decision which does not even mention § 514(b)(2)(B) does not create a conflict meriting the granting of certiorari.

benefits are not insurance (supra, p. 4), and, therefore, McCarran-Ferguson is totally irrelevant. But as the Court of Appeals pointed out, even assuming Knox-Keene is a state law regulating insurance and McCarran-Ferguson would be applicable, ERISA falls within the provision of McCarran-Ferguson (15 U.S.C. § 1012(b)) which excepts from its coverage federal law that "specifically relates" to the business of insurance (Appx. A to Pet., pp. 5-6). ERISA has sections which specifically deal with insurance (e.g., see 29 U.S.C. § 1002(17), 1081(a)(2), 1081(b), 1101(b)(2), 1144(b)(2)(B) and 1323) and, therefore, despite petitioner's assertion to the contrary (Pet., p. 15), ERISA "specifically relates" to the business of insurance.

In any event, since § 514(b)(2)(B) of ERISA expressly says that employee benefit plans are not insurance for the purposes of state laws regulating insurance, Congress has specifically removed any possible conflict between ERISA and McCarran-Ferguson.

III. ERISA'S PREEMPTION OF THE KNOX-KEENE ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OR THE TENTH AMENDMENT.

Petitioner's constitutional arguments (Pet., pp. 15-21) are baseless. Petitioner asserts that passage of ERISA was not a valid exercise of Congress' power under the Commerce Clause on the ground that preemption is not reasonably adapted to one of the goals of ERISA, assuring the equitable character and financial soundness of employee benefit plans.

He argues that ERISA, as opposed to Knox-Keene, does not regulate the type of benefit received and has

no provision for minimum funding (Pet., p. 17). However, ERISA does regulate to assure the equitable character and financial soundness of the plans and needs no assistance from the states. As Congress declared in § 2(b) (88 Stat. 833, 29 U.S.C. § 1001(b)):

> "It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

While this method of regulation may be different from that the state has chosen, it is certainly reasonably adapted to the end Congress sought to achieve. And that is all that the Constitution and the prior decisions (see, e.g., *National League of Cities* v. *Usery* (1976) 426 U.S. 833, 840) require.

With respect to petitioner's Tenth Amendment argument (Pet., pp. 18-21), all that need be said is that this Court in *National League of Cities* v. *Usery* (1976) 426 U.S. 833, 845, made it clear that a possible restriction on congressional exercise of the commerce power arises under the Tenth Amendment only when the federal legislation is directed to the states as states:

> "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which

> they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States."

The Court went on to state the test of whether there has been a violation of the Tenth Amendment is whether the determinations taken from the states by the federal act are "'"functions essential to separate and independent existence"'" (ibid.).

ERISA regulates the private sector and not states qua states. And the regulation of private employee benefit plans by California is not in any way, shape or manner one of the "'"functions essential to separate and independent existence"'" of California as a state.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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